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No. 82-732

In the Supreme Court of the United States

OCTOBER TERM, 1982

REUBEN STURMAN AND JOSEPH ZERNIC, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court was required to hold an evidentiary hearing on petitioners' double jeopardy claim.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A21) is reported at 679 F. 2d 840. The opinion and order of the district court (Pet. App. A22-A26) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1982. A petition for rehearing was denied on August 27, 1982. The petition for a writ of certiorari was filed on October 26, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On October 16, 1980, a grand jury in the Southern District of Florida returned an eight-count indictment (Pet. App. A27-A40) alleging that petitioners had transported obscene materials into the district by common carrier, in violation of 18 U.S.C. 1462 and 1465 (Counts 2-7), and that

petitioners had conspired to commit those offenses, in violation of 18 U.S.C. 371 (Count 1).[1] Prior to trial, petitioners moved to dismiss the conspiracy count on double jeopardy grounds.[2] The district court denied the motion (Pet. App. A22-A26), and the court of appeals affirmed (Pet. App. A3-A21).

1. On March 15, 1976, a grand jury in the Northern District of Ohio returned a 29-count indictment charging petitioners and six co-defendants, including the Sovereign News Company and Melvin Kamins, with violations of federal obscenity laws and conspiracy (Pet. App. A153-A190). That indictment alleged, inter alia, that petitioners and their co-defendants had used the mails and common carriers to effect the movement of obscene materials from Cleveland, Ohio, to Fort Worth, Texas, in violation of 18 U.S.C. 1461 and 1465, and that they had conspired from September 1973 through March 15, 1976, to profit financially by the interstate shipment of obscene materials. At trial the government showed that the obscene materials had been shipped to other parts of the country in addition to Texas—including Pittsburgh, Pennsylvania (*id.* at A7). The evidence also showed that, in connection with petitioners' management of Sovereign News, petitioner Sturman and co-defendant Kamins also directed the business of a

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[1]The October 16 indictment was a superseding indictment. Petitioners were originally indicted along with 43 co-defendants for violations of the obscenity laws and conspiracy (Pet. App. A41-A122). The original conspiracy count alleged that the conspiracy existed from July 1, 1977, to the date of that indictment, February 11, 1980. The superseding indictment alleged that the conspiracy existed from December 1, 1977, to and including February 1980. In the superseding indictment, petitioners were charged along with two other named defendants, Al Bloom and Steve Ast[illegible]l.

[2]Petitioners did not challenge their prosecution on the substantive counts.

number of satellite bookstores throughout the United States; one of these stores was Majestic News of Pittsburgh. No evidence of any Florida transaction or operation was introduced at trial. The jury acquitted petitioners and their co-defendants on the conspiracy count. See generally *United States* v. *Kamins*, 479 F. Supp. 1374, 1386-1388 (W.D. Pa. 1979).

In November 1978, a grand jury in the Western District of Pennsylvania returned a 16-count indictment charging petitioner Sturman and five other co-defendants with 15 counts of transportation of obscene films in interstate commerce, in violation of 18 U.S.C. 1465, and with conspiracy to violate the obscenity laws, in violation of 18 U.S.C. 371 (Pet. App. A123-A152). The conspiracy count alleged that between January 1, 1974, and July 18, 1977, petitioner Sturman, co-defendant Kamins, and the other four named defendants conspired to transport obscene materials in interstate commerce for profit, and that Sovereign News Company in Ohio and Majestic News Company in Pittsburgh were instrumental in the distribution of obscene materials in Pennsylvania, West Virginia, Ohio, and New York. Prior to trial, Kamins and petitioner Sturman moved to dismiss the conspiracy count on double jeopardy grounds, claiming that the indictment charged the same conspiracy already prosecuted in Ohio. The district court agreed and granted the motion. *United States* v. *Kamins, supra*; see Pet. App. A7-A8.[3]

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[3]In dismissing the conspiracy count, the district court observed (479 F. Supp. at 1390-1391):

> We do not agree with the statement of defense counsel at oral argument that the government, once having prosecuted this business enterprise, is *forever* precluded from again charging that it harbored a conspiracy to violate the obscenity laws. The double jeopardy question would have to be faced separately at each

2. The instant indictment's conspiracy count alleged that between December 1, 1977, and February 1980, petitioners, their co-defendants, and others conspired to transport into the Southern District of Florida nine motion pictures for sale and distribution. The indictment enumerated five overt acts in furtherance of the conspiracy; these involved arrangements with FBI undercover agents between December 6, 1977, and January 5, 1980, to ship obscene films to Miami.

Relying upon their acquittals on the Ohio indictment, petitioners moved to dismiss the conspiracy count on double jeopardy grounds. The motions were denied following a review of the transcript of the Ohio trial. In reaching its decision, the district court found that the instant indictment dealt with "an entirely different set of facts and a completely distinct time frame" (Pet. App. A25) from the earlier indictments and that the instant indictment was aimed at reaching "only a specific limited conspiracy to ship obscene material to Miami, Florida" (*id.* at A25-A26).

3. On interlocutory appeal, petitioners claimed that the district court erred in not holding an evidentiary hearing on their motions and in not dismissing the conspiracy count. The court of appeals rejected petitioners' arguments. It stated that "[a]bsent a proffer of evidence demonstrating a nonfrivolous double jeopardy claim there is no obligation to hold an evidentiary hearing * * *" (Pet. App. A18); it

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prosecution, and the passage of time or changes in other elements might be crucial.

Our decision is limited to a comparison of the current indictment with the Cleveland indictment and trial and the inescapable conclusion that the agreement alleged and established at the prior trial was broad enough to encompass the agreement alleged here. While the issues raised in the two conspiracy counts are not identical or congruent, they are sufficiently similar and overlapping to raise the double jeopardy bar to reprosecution.

then held that petitioners had not made the requisite showing of a prima facie claim (*id.* at A17-A18). The court also noted that petitioners had not suggested how an evidentiary hearing could have served any purpose given the extensive record already before the court (*id.* at A17). In addition, the court held that because the two indictments alleged conspiratorial events in separate places, during separate time periods, with different co-conspirators and different proof (since no evidence was introduced at the Ohio trial that even suggested a connection with Miami), prosecution for the two separate conspiracies was not barred by the Double Jeopardy Clause (Pet. App. A3-A17). Judge Hatchett dissented on the ground that the district court should have held an evidentiary hearing (*id.* at A18-A21).

ARGUMENT

Petitioners contend (Pet. 14-26) that the district court erred in denying their double jeopardy claim without an evidentiary hearing. This contention was correctly rejected by the court of appeals and does not merit review by this Court.

The record clearly showed that the Miami transactions that are the subject of this indictment were not a part of the Ohio conspiracy. The district court had before it the complete transcript of the Ohio trial and a record of all other arguably relevant proceedings (Pet. App. A17). These records established that the Ohio prosecution embraced a far-reaching conspiracy, which ended in March 1976, to transmit obscene materials to numerous destinations throughout the country. By contrast, the present indictment alleges an agreement beginning nearly two years later—in December 1977—and limited to the objective of transporting nine obscene films to Miami, a place not mentioned in either the indictment or trial of the earlier case. Moreover, of the seven persons named in the Ohio indictment, only petitioners were named in the Florida indictment; by the

same token, petitioners' co-conspirators named in the Florida indictment were not named in the Ohio indictment. Given these dissimilarities demonstrated by the record with respect to the time, place, and actors in the alleged conspiracies, the district court acted correctly in ruling on the basis of the relevant record materials without resort to an evidentiary hearing. As the court of appeals accurately observed (Pet. App. A17), in these circumstances "it is difficult to imagine what other relevant evidence could have been adduced at an evidentiary hearing," and petitioners do not suggest here what evidence could possibly have been adduced at such a hearing to support their claim.

Petitioners' contention, therefore, is simply that a district court must *always* hold an evidentiary hearing when a double jeopardy claim is raised. No authority supports this proposition. On the contrary, the courts are in agreement that the burden shifts to the government to establish that a prosecution is not barred by the Double Jeopardy Clause only when a defendant has made a preliminary showing that his claim is not frivolous, and no court has held that a hearing must be conducted when the defendant has failed to meet this threshold requirement. See *United States* v. *Bendis*, 681 F. 2d 561 (9th Cir. 1982); *United States* v. *Booth*, 673 F. 2d 27 (1st Cir.), cert. denied, 456 U.S. 978 (1982); *United States* v. *Jabara*, 644 F. 2d 574 (6th Cir. 1981); *United States* v. *Stricklin*, 591 F. 2d 1112 (5th Cir.), cert. denied, 444 U.S. 963 (1979); *United States* v. *Inmon*, 568 F. 2d 326 (3d Cir. 1977); *United States* v. *Mallah*, 503 F. 2d 971 (2d Cir. 1974), cert. denied, 420 U.S. 995 (1975).

Petitioners' contention (Pet. 16-22) that there exists a conflict in the circuits based on their assertion that some courts have recognized that an evidentiary hearing must always be held, even if there is no showing that the claim is not frivolous, is without foundation. In *United States* v.

Inmon, supra, the court found at the outset that the defendant's motion presented a "prima facie non-frivolous claim." 568 F. 2d at 329. Moreover, the court found that an evidentiary hearing was required because, given that the defendant had pleaded guilty to the charges in the first indictment, there were insufficient facts in the record from which to determine whether the two indictments overlapped. *Id.* at 329-330. Here, by contrast, petitioners had a complete trial on their first indictment, and the district court had before it the trial transcript and the record of other relevant proceedings, which provided a more than sufficient basis for its ruling. The other cases relied on by petitioner are inapposite. In neither *United States* v. *Jabara, supra*, nor *United States* v. *Stricklin, supra*, did the court of appeals remand for a hearing. Indeed, in *Jabara* the court affirmed the denial of the defendant's motion to dismiss certain counts on double jeopardy grounds (644 F. 2d at 578), even though it appears that no evidentiary hearing had been held (*id.* at 576-577).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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